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No. 85-1672

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM D. MERCHANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent makes virtually no attempt to defend the court of appeals' ruling that the February 27, 1981, municipal court hearing was invalid because he was not personally notified about it. In our opening brief, we argued that notice to a defendant's attorney of any proceeding that occurs during the course of a criminal prosecution satisfies any due process requirement that the defendant himself be notified. Respondent's entire answer (Resp. Br. 22) is that *Faretta* v. *California*, 422 U.S. 806 (1975), held that the right to notice is personal to the accused. As we have explained (U.S. Br. 18-19), however, the passage in *Faretta* on which respondent relies states only that a defendant must be informed of the charges against him. That proposition is wholly irrelevant to the question presented by this case.

Rather than defend the court of appeals' ruling, respondent argues (Resp. Br. 12-25) that the February 27 hearing was invalid because he was not present. The court of appeals left that question open (Pet. App. 10a n.5), and there is no need for the Court to resolve it in this case. If the evidence seized from respondent's residence during the

March 3, 1981, search was admissible under the good faith exception to the exclusionary rule adopted in *United States* v. *Leon,* 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard,* 468 U.S. 981 (1984), the court of appeals' judgment must be reversed and respondent's conviction reinstated regardless of whether the February 27 hearing was flawed because respondent was absent. In any event, respondent was not denied due process because he was absent from the February 27 hearing.

A defendant has a right to be present at his trial and at a variety of proceedings that occur both before and after the jury renders its verdict. The Due Process Clause, however, does not give the defendant the right to be present at every proceeding in a criminal case. Instead, the presence of a defendant is a condition of due process "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder* v. *Massachusetts,* 291 U.S. 97, 108 (1934); see also *United States* v. *Gagnon,* 470 U.S. 522, 526 (1985). Among the kinds of proceedings that may be held in a defendant's absence are those devoted to purely legal questions. See Fed. R. Crim. P. 43(c)(3) (defendant need not be present "[a]t a conference or argument upon a question of law"); *Price* v. *Johnston,* 334 U.S. 266, 285 (1948) (defendant's presence unnecessary at appellate proceedings).

The February 27 hearing falls squarely into that category of proceedings. There were only two questions before the municipal court at that hearing: (1) whether the court's November 14, 1980, order stayed respondent's probation in its entirety or only that part imposing a period of six months' confinement, and (2) if the order stayed respondent's probation in its entirety, whether that stay should be lifted (see J.A. 44-46). Both questions involved legal considerations that defense counsel could effectively address in his client's absence. Nor was there anything unusual about the proceeding that might have required

respondent's presence. The prosecutor did not offer any evidence, and respondent's attorney did not argue that an evidentiary hearing was necessary. There was therefore no factual issue raised at the hearing as to which respondent's presence may have been helpful. Moreover, respondent's attorney did not suggest that there were any new facts justifying a continued stay of the probation order. In fact, respondent's counsel did not even contest the prosecutor's motion. On the contrary, respondent's attorney agreed that the prosecutor's motion was "well taken" (Pet. App. 22a). Finally, it is immaterial that the effect of the court's February 27 order was to advance the date on which the conditions of respondent's probation would go into effect. Respondent was present at sentencing when those conditions were imposed, and a prisoner does not have a right to be present when a stay of the execution of his sentence is lifted. See *Schwab* v. *Berggren,* 143 U.S. 442, 451 (1892) (prisoner has no right to be present when an appellate court fixes the date of execution on a sentence imposed by the trial court). In these circumstances, respondent could not have been prejudiced by his absence from the February 27 hearing. Cf. *Snyder,* 291 U.S. at 109 ("the risk of injustice to the prisoner" from allowing the jury to view the crime scene in his absence "ceases to be even a shadow" when he admits that the jury was shown the correct scene).[1]

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[1] Even if the failure by respondent's counsel to object at the hearing to going forward in his client's absence does not amount to a waiver of respondent's claim (but cf., *e.g., Howard* v. *Kentucky,* 200 U.S. 164, 173 (1906) (due process not violated by trial court's in camera questioning of juror in the absence of the defendant and defense counsel when defense counsel had agreed to that procedure)), the lack of an objection by respondent's attorney adds support to the conclusion that respondent was not prejudiced (see *Gagnon,* 470 U.S. at 529; see generally *Wainwright* v. *Witt,* 469 U.S. 412, 431 n.11 (1985)).

Respondent argues (Resp. Br. 20-21) that he was prejudiced in several ways because he was not present at that proceeding. For example, respondent claims (Resp. Br. 16-18, 21) that he lost the right to be free from a warrantless search by his absence from that hearing because he did not consent to the search condition of his probation at sentencing. The record does not support that claim.

At sentencing, the municipal court clearly told respondent that one of the conditions of his probation was that he would be subject to warrantless searches during the term of his probation (J.A. 40). Respondent did not object to that condition; he objected only to the six-month period of confinement (*id.* at 39-42). At the end of the sentencing hearing, respondent signed the court's judgment of probation immediately below a printed statement reciting that "I have received a copy, read and understand the above conditions of probation" (*id.* at 33). Under the heading "Conditions of Probation," the judgment required respondent to consent to the warrantless search of his residence by any law enforcement officer (*ibid.*). By signing the judgment, respondent gave his consent under state law to the search condition of his probation. See *People* v. *Byrd,* 38 Cal. App. 3d 941, 948, 113 Cal. Rptr. 777, 782 (1974).[2]

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[2] There is no merit to respondent's argument (Resp. Br. 15-16) that probation in California is similar to a plea bargain. In *People* v. *Mason,* 5 Cal. 3d 759, 488 P.2d 630, 97 Cal. Rptr. 302 (1971), cert. denied, 405 U.S. 1016 (1972), and *People* v. *Superior Court,* 12 Cal. 3d 858, 528 P.2d 41, 117 Cal. Rptr. 433 (1974), the California courts recognized that consent-to-search probation conditions were valid, but in neither case did the court hold that a defendant must be apprised at sentencing that he has waived his Fourth Amendment rights. *Blair* v. *Pitchess,* 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), on which respondent relies, did not involve a probation search at all. In addition, the California Supreme Court's most recent decision on this topic, *People* v. *Burgener,* 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986), upheld a similar condition on a parolee

Respondent also contends (Resp. Br. 13-14, 21) that his absence from the hearing deprived him of the opportunity to ask the court to modify or eliminate the search condition, or to refuse probation and accept the six-month period of incarceration instead. The municipal judge, however, was insistent that respondent not possess firearms during his probation (U.S. Br. 33; J.A. 38-39). For that reason, it is highly dubious that the court would have been willing to eliminate the condition that allowed the firearms restriction to be enforced. Respondent's claim that he might have agreed to confinement rather than accept probation is also speculative. The only evidence respondent cites to support that claim is his own affidavit submitted at the suppression hearing in this case (J.A. 92-93). Even the affidavit does not suggest that respondent would have accepted confinement rather than probation; it says only that he signed the probation form on the advice of his attorney that signing the form was necessary to obtain a stay pending appeal. Moreover, at sentencing respondent objected only to the confinement period, not to the search condition (J.A. 40). Thus, respondent's position at the sentencing hearing is inconsistent with the position he subsequently took in the affidavit he filed in connection with his suppression motion, when it was clearly in his interest to claim that he would not have accepted immediate probation.

Finally, respondent argues (Resp. Br. 21) that his absence from the hearing prevented him from learning of the state court's February 27 order and from conforming his conduct to the requirements of his probation by getting rid of the firearms that were discovered at his home. The

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after balancing the governmental and private interests, rather than by relying on a waiver or consent theory (41 Cal. 3d at 535-536, 714 P.2d at 1270-1271, 224 Cal. Rptr. at 132-133, citing *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985)).

risk that a defendant might not learn the outcome of a particular proceeding is not a sufficient reason to require the defendant's presence at that proceeding. If it were, there would be no proceeding in a criminal case that would be constitutionally valid if conducted in the defendant's absence. A defendant's lack of notice of an order entered in his absence may have other consequences—such as giving him a defense against sanctions for violating the order—but it does not render the order void *ab initio*.

This case provides an instructive illustration of this distinction. Because respondent did not learn of the municipal court's February 27 order, the state superior court held that respondent's probation could not be revoked for violating that order. *People* v. *Merchant*, No. 296 (Cal. Super. Ct. Nov. 17, 1981), slip op. 2 (J.A. 200). That court noted, however (*ibid.*), that respondent's lack of notice of the municipal court's order did not mean that the order was invalid or that the search of respondent's residence was unlawful.[3]

2. Respondent (Resp. Br. 26-38) and amici (ACLU Br. 12-56) argue that the good faith exception to the exclusionary rule should not be applied beyond the warrant context. The good faith exception, they argue, was de-

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[3] Respondent also argues (Resp. Br. 18-20) that he was deprived of his state law right to be present at the hearing. California law does not differ from federal law on this point, however. The state courts have consistently applied the test adopted by this Court in *Snyder*, 291 U.S. at 105-108, and reiterated in *Gagnon*, 470 U.S. at 526, to determine whether a defendant's right to be present has been abridged. *People* v. *Jackson*, 28 Cal. 3d 264, 309, 618 P.2d 149, 172, 168 Cal. Rptr. 603, 626 (1980), cert. denied, 450 U.S. 1035 (1981); *In re Lessard*, 62 Cal. 2d 497, 505-507, 399 P.2d 39, 45, 42 Cal. Rptr. 583, 589 (1965); *People* v. *Abbott*, 47 Cal. 2d 362, 372, 303 P.2d 730, 737 (1956); *People* v. *Isby*, 30 Cal. 2d 879, 894, 186 P.2d 405, 414 (1947). That test requires a defendant to show that he was prejudiced. For the reasons given above, respondent was not prejudiced by his absence from the February 27 proceeding. Respondent's argument therefore fares no better under state law than under the Due Process Clause.

signed to encourage police officers to obtain warrants before executing a search; no similar Fourth Amendment policy, they contend, is served by encouraging officers to rely on a consent-to-search condition.

That argument misconstrues the Court's opinion in *United States* v. *Leon, supra. Leon* reiterated the familiar principles that a warrant-authorized search is preferable to a warrantless search and that Fourth Amendment rules should be designed to encourage police officers to resort to the warrant process. 468 U.S. at 914. But those are principles of substantive Fourth Amendment law; they do not govern the question whether the exclusionary rule should apply in a particular case once a Fourth Amendment violation has been found. The applicability of the exclusionary rule depends on whether the exclusion of evidence in a particular case would have "any deterrent effect * * * [on] the behavior of individual law enforcement officers or the policies of their departments" (*id.* at 918). *Leon* concluded that when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope, the exclusionary rule is a particularly ineffective deterrent, because in most such cases any error is attributable to the court, not to the officer (*id.* at 920-921). Under that analysis, the good faith exception is not tied to the policy of encouraging resort to the warrant process. Instead, the exception is based on the deterrent effect of the exclusionary sanction in particular contexts.

The Court's determination in *Leon* that the exclusionary rule cannot deter objectively reasonable police conduct does not depend on the type of authority on which a police officer relies. The exclusionary rule will not deter a police officer from conducting a search that he reasonably believes to be authorized. The relevant question therefore is whether an officer had an objectively reasonable belief

that his conduct was lawful, not whether the officer relied on a search warrant rather than some other form of judicial authorization, such as a consent-to-search clause.

Respondent argues (Resp. Br. 32-33) that the good faith exception should not be applied to a consent-to-search condition of probation because of the difficulty in determining whether a law enforcement officer has an objectively reasonable belief that his conduct is lawful. That difficulty, respondent claims, stems from the fact that under California law a police officer may rely on such a condition at any time after a judgment of probation is entered, even if he did not participate in the proceedings at which the condition was imposed.

We see no special difficulty in applying the good faith exception in this context. Because a state court judgment is presumptively valid (see *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967)),[4] an officer who executes a probation search should be entitled to rely on the judgment of probation even if he did not participate in the trial court proceedings. Beyond that, the good faith exception presupposes that a police officer is reasonably well trained and is aware of the relevant legal principles, including recent developments in the law. In this case, there was no development that should have put the searching party on notice that the municipal court's probation judgment or its February 27 order was defective (U.S. Br. 27 n.16). Accordingly, there is no reason to suppress evidence acquired as the result of an objectively reasonable search simply

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[4] Respondent is wrong in suggesting that a consent-to-search clause is a disfavored source of authority under California law. The state supreme court has upheld these conditions of probation for nearly 15 years without suggesting that they are a questionable source of authority to execute a search. See *People* v. *Mason*, *supra*; *People* v. *Burgener*, *supra*.

because the court that entered the order on which the search was based made a technical mistake in the process of entering the order.[5]

3. Respondent also maintains (Resp. Br. 26-31, 33-38) that the prosecutor's and officers' actions were not objectively reasonable, but his argument is premised on several factual inaccuracies.[6] Beyond that, respondent's arguments amount to little more than second-guessing the actions of the prosecutor and the police.

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[5] Amici contend (ACLU Br. 46-51) that it is unnecessary to apply the good faith exception to warrantless searches because the exceptions to the warrant requirement already authorize reasonable police conduct. The fact that some warrantless searches are lawful does not somehow render the good faith exception inapplicable when a police officer has reasonably but mistakenly engaged in an unlawful warrantless search. As we have noted, the deterrence rationale that underlies the exclusionary rule does not have any force when police officers are acting in reasonable reliance on an apparently valid authorization to search, whether or not the authorization takes the form of a warrant.

There is also no force to the argument (ACLU Br. 51-56) that applying the good faith exception in the present context will retard the development of Fourth Amendment law. *Leon* rejected the identical argument in the context of a warrant-authorized search (468 U.S. at 924-925), and the Court's reasoning is fully applicable here. As the Court explained in *Leon*, the benefits of suppression are sufficient to ensure that defendants will continue to raise colorable Fourth Amendment claims (*id.* at 924 n.25), and the good faith exception will not prevent courts from addressing the merits of Fourth Amendment claims when it is necessary to provide guidance to law enforcement officers (*id.* at 925).

[6] For example, respondent asserts (Resp. Br. 36) that the municipal court judge was "ambivalen[t]" about the legality of the search when he was contacted by respondent's attorney after the prosecutor and officers arrived at respondent's home. In fact, the judge simply declined to take a position whether the search was lawful. See J.A. 74-75. In addition, respondent asserts (Resp. Br. 26-27 (emphasis in original)) that "the officers (under the prosecutor's guidance) determined to enter respondent's residence with full knowledge that his probation

Respondent contends (Resp. Br. 27) that the search was not related to his probation supervision, because he had not been assigned a probation officer. But, as we have explained (U.S. Br. 32-33), the search was clearly related to the protection of the public and the rehabilitation of respondent, both of which are goals of the probation process in California. That is all California law requires. Supervision is not a goal of the probation process, but is the method by which the goals of probation are attained (see U.S. Br. 32 n.19). A search of a probationer is one of the ways that he is supervised. See *People* v. *Mason,* 5 Cal. 3d 759, 763-764, 488 P.2d 630, 632, 97 Cal. Rptr. 302, 304 (1971), cert. denied, 405 U.S. 1016 (1972).

Similarly, respondent argues (Resp. Br. 29-30) that the prosecutor acted unreasonably because she went ahead with the search after respondent and his lawyer told her that respondent was unaware of the February 27 order. But respondent's argument asks too much of the searching team. The municipal court's judgment of probation and its February 27 order were facially valid, and it would be

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had *not yet even begun.*" In fact, the prosecutor testified only that respondent did not have a probation officer assigned at the time of the search and that she did not contact the probation office before conducting the search. J.A. 76-77. It is irrelevant that the prosecutor did not contact the probation department before respondent's home was searched. We have explained (U.S. Br. 30) and respondent concedes (Resp. Br. 32) that California law does not require a probation officer to be a party to the search of a probationer. The prosecutor therefore had no need to contact the probation department. Additionally, as we have explained (U.S. Br. 32 n.19) and as respondent concedes (Resp. Br. 34 n.29), in California the county probation department is responsible for determining the level of supervision for a probationer. Here, the probation department did not assign respondent a probation officer because he had appealed his convictions (U.S. Br. 32 n.19; J.A. 89). Even if that eminently reasonable decision was erroneous for some reason, any fault lies with the probation department, not the prosecutor, and it does not undermine the reasonableness of the search in this case.

unreasonable to require a police officer to terminate an ongoing search whenever a person (or his lawyer) claims that the order authorizing the search was somehow defective, regardless of how fervent those claims may be.

There is nothing about this case that requires a different result. Nothing that the prosecutor knew, should have known, or was told could have led a reasonable person to conclude that the municipal court's orders were invalid. Although the prosecutor knew that the state municipal court had stayed at least part of respondent's probation, the court of appeals' ruling that respondent's probation was stayed in its entirety (Pet. App. 6a) rested on a decision (*In re Kennick*, 128 Cal. App. 3d 959, 180 Cal. Rptr. 731 (1982)) that was handed down *after* the search in this case. Moreover, while the prosecutor knew that respondent was not present at the February 27 hearing, she cannot reasonably be charged with anticipating that the order entered at that hearing would be invalidated because of respondent's absence on that day. It was therefore reasonable for the search team to rely on the probation judgment and the February 27 order, rather than to accept uncritically the protestations of respondent and his attorney.

Respondent also maintains (Resp. Br. 27) that, because the reports of gunfire on his property came at a time that he did not believe he was forbidden to possess firearms, it was unreasonable for the prosecutor to conclude that respondent would not rid himself of his firearms once he learned that the probation order had gone into effect. That argument, however, misstates the relevant inquiry. Under *Leon*, the question is not whether *respondent* reasonably believed that he was *not* on probation, but whether the *prosecutor* and *police* reasonably believed that he *was*. As we have explained (U.S. Br. 26-27), the record in respondent's case amply supported the prosecutor's conclusion that respondent was on probation, and the best

proof that the prosecutor's belief was reasonable is that the state municipal court and the district court concluded (U.S. Br. 8 n.6; Pet. App. 17a) that respondent was in fact on probation at the time of the search. See *Leon*, 468 U.S. at 926; U.S. Br. 28.[7]

For the foregoing reasons and those given in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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[7] Respondent contends in passing (Resp. Br. 27) that the prosecutor had no reason to believe that respondent possessed firearms at the time of the search, since the reports of gunfire on his property were several weeks old by then. Respondent had been recently convicted of brandishing weapons in public, and he apparently had been wrongfully involved with firearms beforehand as well (U.S. Br. 33 & n.20; J.A. 38-39, 42-43, 159-161). In light of respondent's use of firearms on prior occasions, the prosecutor was entitled to conclude that respondent had resumed his former ways and was continuing to possess firearms at the time of the probation search.

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